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6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA

8 In re) Bankruptcy Case
9 CENTURY 21 HERD AND CO. REALTORS,) No. 95-34447DDM
10 INC., a California Corporation,) Chapter 7
11 Debtor.)
12 ROBERT M. DAMIR, Chapter 7 Trustee,) Adversary Proceeding
13 Plaintiff,) No. 97-3498DM
14 v.)
15 MELANIE HILDEBRAND, NIEL)
16 HILDEBRAND, CHARLES COLLIVER,)
17 CENTURY 21 ALLIANCE, A California)
18 Corporation, and DOES 1 through 20,)
inclusive,)
Defendants.)

19 **ORDER REGARDING BILL OF COSTS**
20 **AND MOTION TO FIX ATTORNEYS' FEES**

21 On May 13, 1999, this court entered a judgment in favor of
22 Robert M. Damir, Chapter 7 Trustee ("Plaintiff") against Melanie
23 Hildebrand, Niel Hildebrand and Century 21 Alliance
24 (collectively, "Defendants"). On May 14, 1999, Plaintiff filed a
25 bill of costs, requesting costs in the amount of \$10,263.94.
26 Defendants have filed an objection to the bill of costs. On May
27 21, 1999, Plaintiff filed a motion to fix amount of attorneys'

1 fees under California Civil Code section 1717. Defendants oppose
2 this motion as well. On June 18, 1999, this court held a hearing
3 on the motion to fix attorneys' fees and on the bill of costs.
4 Michael B. Bassi, Esq. and Dena M. Roche, Esq. appeared on behalf
5 of Plaintiff; James S. Mori, Esq. appeared on behalf of
6 Defendants. Counsel for Plaintiff filed a supplemental
7 declaration in support of the motion to fix attorneys' fees on
8 July 1, 1999; Defendants filed their supplemental reply
9 memorandum on July 16, 1999. The court then took the matters
10 under submission. For the reasons stated below, the court will
11 reduce the requested costs by \$691.07 and allow Plaintiff to
12 recover \$9,572.87 on his bill of costs. The court will also fix
13 the attorneys' fees allowable under California Civil Code section
14 1717 at \$5,797.22.

15 **I. Bill of Costs**

16 Pursuant to B.L.R. 1001-2(a)(49) (incorporating Civil L.R.
17 54-1 through 54-4), the burden of proof is on the Defendants to
18 establish that Plaintiff's bill of costs is "incorrectly stated,
19 unnecessary or unreasonable." See Civil L.R. 54-1(c). With two
20 exceptions, Defendants have not met their burden here.
21 Defendants objected to the validity of the costs, but Plaintiff
22 has produced invoices to support the charges. All of the costs
23 are allowable under the local rules, except for the following:

24 Reproduction Costs to Robert A. Cook & Staff (5 entries
25 totalling \$394.44): Plaintiff has not established that
26 these copying costs related to government records,
27 formal discovery documents, or trial exhibits.
Pursuant to Civil L.R. 54-3(d)(1), (2), or (5), these
costs are therefore not allowable.

1 Reproduction Costs to Copy Corps for Expert Witness
2 Copies (2 entries totalling \$296.63): While Civil L.R.
3 54-3(d)(2) allows cost of reproducing discovery when
4 used for any purpose, the rule contemplates one copy of
5 discovery - not multiple copies of the same discovery
6 copied for the convenience of a witness. Plaintiff can
7 recover the cost of duplicating the discovery once, not
8 twice. The court will therefore disallow \$296.63.

9 The court will therefore allow Plaintiff to recover
10 \$9,572.87 on his bill of costs, after deducting the foregoing
11 costs totalling \$691.07.

12 **II. Motion to Fix Attorneys' Fees**

13 California Civil Code section 1717 allows a party prevailing
14 on an action on a contract to recover reasonable attorneys' fees
15 in addition to other costs. Plaintiff is seeking \$17,008.75 in
16 fees, even though he recovered only \$17,391.66 on his breach of
17 contract claim (which he did not even plead until after the
18 trial, when he filed a motion to amend the complaint). The court
19 will not allow Plaintiff to recover these fees, because he has
20 not demonstrated that they are attributable to formulating and
21 prosecuting a breach of contract claim, because the fee
22 calculation offered by Plaintiff's counsel is without adequate
23 foundation, and because the fees are not reasonable. Because
24 Plaintiff's counsel has not offered credible and sufficient
25 grounds for asserting that it expended 20 percent of its total
26 time in prosecuting the breach of contract claim and because its
27 time records do not support its calculations, the court will
28 treat the claim as though it were prosecuted on a contingency
29 basis and fix the "reasonable" fee at one-third of the amount

1 recovered on the breach of contract claim: \$5,797.22.

2 Plaintiff's counsel did not initially plead a breach of
3 contract claim against Defendants. Plaintiff did not argue or
4 assert a breach of contract claim in his trial brief. Plaintiff
5 did not present this claim until he filed a post-trial motion to
6 amend his complaint to assert the contract claim. Instead, the
7 focus of Plaintiff's case and the trial was his fraudulent
8 transfer theory of recovery. Any work performed by Plaintiff's
9 counsel on the contract claim was - until after the trial - de
10 minimus. Plaintiff's counsel nevertheless asserts that its work
11 on the contract claim was "inextricably intertwined" with the
12 work it billed for the work performed on the fraudulent transfer
13 claims. Plaintiff's counsel therefore estimates that twenty
14 percent of its total fees relate to the contract claim. The
15 court doubts the validity of this calculation. The court sat
16 through this trial and is aware of the work done by Plaintiff's
17 counsel vis-a-vis the breach of contract claim. The court finds
18 it implausible that Plaintiff's counsel spent twenty percent of
19 its total time on this claim, when Plaintiff did not even plead
20 the claim until after the trial and at the court's suggestion.
21 Plaintiff's counsel focused almost exclusively on its fraudulent
22 transfer theory of recovery at trial and in its brief filed with
23 the court. Civil Code section 1717 does not apply to fraudulent
24 transfer claims; it applies to attorneys' fees incurred with
25 respect to a contract claim. See Rothery v. Marshack (In re
26 Rothery), 200 B.R. 644 (9th Cir. BAP 1996) (Chapter 7 trustee's

1 successful fraudulent transfer proceeding was not an action "on a
2 contract" entitling the trustee to fees under California Civil
3 Code section 1717); Exxess Electronixx v. Heger Realty Corp., 64
4 Cal.App.4th 698, 75 Cal.Rptr.2d 376, 383 (1998) ("This
5 distinction between contract and tort claims flows from the fact
6 that a tort claim is not "on a contract" and is therefore outside
7 the ambit of section 1717."). Based on its experience and
8 observations before, during and after trial, this court cannot
9 accord credence to Plaintiff's estimation of time expended on the
10 contract claim. See Niederer v. Ferreira, 189 Cal.App.3d 1485,
11 1507, 234 Cal.Rptr. 779 (1987) (in setting reasonable fee under
12 section 1717, "the trial court may rely on its own experience and
13 knowledge in determining the reasonable value of the attorney's
14 services"). The court therefore finds that the requested fee is
15 unreasonable and will fix the fee in an amount which would have
16 been recoverable in a contingency fee case: one-third of the
17 recovery on the contract claim. Attorneys' fees for Plaintiff
18 under California Civil Code section 1717 is therefore set at
19 \$5,797.22.

20 Based on the foregoing, it is hereby

21 ORDERED that Plaintiff recover from Defendants \$9,572.87 for
22 his bill of costs; it is further

23 ORDERED that Plaintiff recover from Niel Hildebrand and
24 Melanie Hildebrand \$5,797.22 as his attorneys' fees under
25 California Civil Code section 1717.

1 Dated: August __, 1999

2 Dennis Montali
3 United States Bankruptcy Judge
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